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No. 90-1627

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COMMISSIONER OF REVENUE SERVICES
OF THE STATE OF CONNECTICUT,
Petitioner,
v.
SFA FOLIO COLLECTIONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should overrule its longstanding decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), under which states can impose use tax collection obligations on out-of-state businesses only if they have a "physical presence" in the state.

2. Whether a state court decision interpreting state law to bar the attribution of activities of related corporations to the respondent (for purposes of determining its "physical presence" within the state) rests on an independent and adequate state ground.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

SFA Folio Collections, Inc. ("Folio") is a New York corporation that conducts a mail order business. Pet. App. A4, A30.[1] It is wholly-owned by Saks & Company ("Saks"), a New York corporation headquartered in New York City. *Id.* Folio solicits sales by sending catalogs to prospective customers, including customers in Connecticut. Pet. App. A5, A32. Customers place orders for merchandise displayed in the catalogs by contacting Folio directly in New York by mail or by using a toll free "800" number that puts them in contact with Folio employees in New York. Pet. App. A5-A6, A31-A32.

[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that SFA Folio Collections, Inc. is a wholly-owned subsidiary of Saks and Company. SFA Folio Collections, Inc. has no subsidiaries.

Folio then ships the merchandise from New York to these purchasers by common carrier or United States mail. Pet. App. A6, A30-A31. Folio refers its customers to its New York facilities for customer assistance, merchandise return or exchange, and all other customer services. Pet. App. A6, A32.

Folio maintains no physical presence whatsoever in Connecticut; it conducts all of its business activities from its sole place of business in Yonkers, New York. Pet. App. A6, A31-A32. Folio does not operate retail stores anywhere, and does not maintain or use any store, office, warehouse, or other place of business in Connecticut. *Id.* Folio does not have any solicitors, agents, or representatives in Connecticut. *Id.* Folio has no inventory or merchandise in the state, and is not licensed to do business in Connecticut. *Id.* Folio has no telephone listing or bank accounts in Connecticut, does not retain security interests in any goods sold to Connecticut residents, and does not investigate credit or collect accounts in Connecticut. *Id.*[2] Folio does not design, prepare, print, publish or mail its catalogs in or from Connecticut. Pet. App. A5 n.3, A32. Folio's only contacts with Connecticut occur through the mail, common carriers, and "800" telephone lines. Pet. App. A6, A31-A32.

Folio's parent company, Saks, also owns Saks Fifth Avenue of Stamford, Inc. ("Saks-Stamford"), a Connecticut corporation that operates a retail store in Stamford, Connecticut. Pet. App. A5, A33-A34. Folio and Saks-Stamford are separate corporations. Pet. App. A5, A34-A35. The management decisions and day-to-day operations of each corporation are conducted by separate management groups that operate independently and autonomously; neither group makes decisions for the other corporation. Pet. App. A5, A35. To the extent that

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[2] Folio does not fill any order that is paid by check until after the check has been cleared by the bank, and, therefore, has no need to collect delinquent accounts in Connecticut. Pet. App. A5 n.4.

Folio utilizes advertising, marketing or merchandising services from its parent, Saks, it pays a fee for these services pursuant to a written agreement. Folio does not procure any of these services from Saks-Stamford.

Folio sells some of the same items that are available at Saks-Stamford, but many of these items are also available from retailers not affiliated in any way with Folio or Saks. Pet. App. A5, A34. Folio customers who choose to use Saks-Stamford's in-store tailoring services are charged the standard fees by the store; these services are available to anyone. Pet. App. A5, A33-A34.

Connecticut imposes a tax on the "acceptance, consumption or any other use . . . of tangible personal property purchased from any retailer" for use in the state. Conn. Gen. Stat. Ann. § 12-411(1) (West 1983 & Supp. 1990). The liability for the tax rests with the consumer (*id.* § 12-411(2)), but a "retailer" "engaged in business in the state" is obligated to collect the tax and remit it to Connecticut's taxing authorities (*id.* § 12-411(3)). The term "engaged in business in the state" was defined to require either the direct or indirect use "of any office, place of distribution, sales or sample room . . . or other place of business" in Connecticut, or the presence of a "representative, agent, salesman . . . or solicitor" in Connecticut. *Id.* § 12-407(15) (1987) (cited at Pet. App. A3).[3]

In February, 1987, the Commissioner of Revenue Services of the State of Connecticut (the "Commissioner") determined that Folio met the definition of "engaged in business in the state," and notified Folio that it must therefore register as a "retailer" and collect use tax on

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[3] This definition has since been broadened to encompass retail sales made from outside the state through "the distribution of catalogs, periodicals, advertising flyers or other advertising" in the state. Conn. Gen. Stat. Ann. § 12-407(15) (West Supp. 1990).

its Connecticut mail order sales. Pet. App. A36. Folio took the position that the attempt to impose these duties was an unconstitutional application of Connecticut law, and declined to register. *Id.* Therefore, to implement his decision, the Commissioner assigned Folio a tax registration number even though Folio had not applied for such a number. *Id.* On July 1, 1987, the Commissioner issued a $234,450.28 sales and use tax assessment against Folio for its failure to collect the tax. Pet. App. A4, A36-A37.

Folio petitioned for reassessment. Pet. App. A4. Folio asserted that it was not "engaged in business" in Connecticut for purposes of Conn. Gen. Stat. § 12-407(15), and thus not subject to tax. Pet. App. A4. Folio also argued that, in any event, it could not constitutionally be required to collect or pay Connecticut use tax. *Id.* The Commissioner denied Folio's petition. *Id.*

Folio appealed to the Connecticut Superior Court, which reversed. Pet. App. A21-A28. The court rejected the Commissioner's argument that the constitutional standards established in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), were no longer applicable. Pet. App. A27-A28. Rather, applying *National Bellas Hess* to the facts at hand, the court concluded that "[t]he finding of the Commissioner's unit chief that Folio is engaged in business in Connecticut . . . has no basis in the evidence or in the law." Pet. App. A24.

The Commissioner appealed to the Connecticut Supreme Court, which unanimously affirmed. Pet. App. A1-A20. First, the Court rejected the Commissioner's argument that *National Bellas Hess* should be overruled. Pet. App. A16-A20. The Court concluded that the Commissioner's argument in large part tracked the arguments rejected in *National Bellas Hess* and "in essence parallel[ed] the reasoning of the dissent in *National Bellas Hess*." Pet. App. A20. Since the Commissioner's

position therefore had already been considered and rejected by this Court, the Connecticut Supreme Court declined to "dispense with the constitutional safeguards of the [commerce clause and the due process clause.]" Pet. App. A20.

Second, applying the standard established in *National Bellas Hess*, the court rejected the Commissioner's argument that Folio had sufficient nexus with Connecticut to "sustain the imposition of sales and use taxes." Pet. App. A7. This nexus, the Commissioner claimed, derived from Saks-Stamford, which operated a retail store in Connecticut. Although Saks-Stamford is a distinct corporation, the Commissioner argued that "their separate corporate existence should be disregarded and they should be treated as one enterprise for purposes of establishing a nexus for taxation." Pet. App. A11. After reviewing Connecticut corporate law and the Superior Court's factual findings, the court declined to "pierce the corporate veil" because the standard established by the Connecticut courts for doing so had not been met. Pet. App. A11-A12 (citing *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.*, 187 Conn. 544, 557, 447 A.2d 406 (1982)). As the court explained, under Connecticut law, courts "pierce the corporate veil only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." Pet. App. A11 (internal quotations and citations omitted). This petition followed.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER TO OVERRULE *NATIONAL BELLAS HESS, INC. v. DEPARTMENT OF REVENUE.*

Petitioner candidly admits that the central focus of his petition is to "ask this Court to revisit its decision in *Bellas Hess.*" Pet. at 7. There is no reason to do so.

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held that states may not constitutionally require an out-of-state seller to collect use tax on mail order sales to residents of a state in which the seller's only contacts are by mail or common carrier. The Court found that such interstate communications did not create a "nexus" sufficient to support the imposition of use tax collection obligations without violating the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. In reaching this result, this Court formulated the appropriate use tax nexus test by focusing on the seller's physical presence, *i.e.*, "retail outlets, solicitors, or property," "within the taxing state. *Bellas Hess*, 386 U.S. at 758. In *Bellas Hess*, the Court also refused to allow Illinois to impose use tax collection and payment obligations on the out-of-state mail order seller because it would create "unjustifiable local entanglements" of interstate commerce. *Bellas Hess*, 386 U.S. at 760. "The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National [Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Id.* at 759-60 (footnotes omitted).

The continuing validity of *National Bellas Hess* has been repeatedly recognized both by this Court [4] and the

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[4] *See infra* at 15.

lower state and federal courts, both for its central role in defining adequate nexus in state taxation cases,[5] and especially its control of use tax collection cases involving

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[5] *See, e.g., Alaska Airlines, Inc. v. Dept. of Revenue*, 769 P.2d 193, 198 (Or. 1989) (citing *Bellas Hess* "minimum connection" language as first prong of Commerce Clause test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *infra* p. 15), *cert. denied*, 110 S.Ct. 717 (1990); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax*, 382 N.W.2d 145, 150 (Iowa 1986) (State tax must meet nexus test articulated in *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), and refined by *National Bellas Hess* and *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977)), *cert. denied*, 479 U.S. 817 (1986); *Avco Financial Serv. Consumer Discount Co. One, Inc. v. Director Div. of Taxation*, 494 A.2d 788, 795 (N.J. 1985) (distinguishing *Bellas Hess* on ground of "distinctive contacts" with the State: "Unlike the mail order house in *National Bellas Hess*, or the department store in *Miller Brothers*," this seller "entered the taxing state to dun its customers," used "affiliated in-state offices for customers to drop payments," used the State's credit service agencies, and "invoked the State's process to enforce its contracts."); *National Meat Ass'n v. Deukmejian*, 743 F.2d 656, 658 n.1 (9th Cir. 1984) (comparing *National Geographic* and *Bellas Hess*, noting that factor establishing nexus in *National Geographic* was maintenance of offices in state), *aff'd*, 469 U.S. 1100 (1985); *Evanston Ins. Co., Inc. v. Merin*, 598 F. Supp. 1290, 1305 (D.N.J. 1984) (*Bellas Hess* is the "leading case defining the minimal connection required between an out-of-state business and a state before the state may impose tax liability," and "critical threshold" for triggering the power to tax is whether company "stations agents or establishes offices to conduct any business in the taxing state." *Id.* at 1306); *Illinois Com. Men's Ass'n v. State Bd. of Equal.*, 671 P.2d 349, 355 (Cal. 1983) (presence of agents in State formed "definite link" and "minimum connection" required to justify imposition of gross premium-tax), *appeal dismissed*, 466 U.S. 933 (1984); *Boswell v. Paramount Television Sales, Inc.*, 282 So.2d 892, 897 (Ala. 1973) (emphasizing that *Bellas Hess* requires physical presence); *Evansville-Vanderburgh Air. A.D. v. Delta Air., Inc.*, 265 N.E.2d 27, 28 (Ind. 1970) (citing *Bellas Hess* for "basic principle governing the power of a state to levy a tax affecting interstate commerce," "to make such commerce bear a fair share of the cost of the local government whose protection it enjoys").

out-of-state mail order houses.[6] The Connecticut Supreme Court was clearly correct in concluding that "[t]his appeal is governed by the United States Supreme Court decision in *National Bellas Hess, Inc. v. Department of Revenue*." Pet. App. A7.[7]

The sole conflicting appellate decision is a decision of the North Dakota Supreme Court rendered after the filing of the petition, in *North Dakota v. Quill Corp.*, No. 900257 (May 7, 1991).[8] The existence of that de-

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[6] *See, e.g., Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990) (retention of title to films rented in State did not constitute sufficient nexus to support imposition of use tax collection obligations), *cert. denied*, 111 S.Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Commonwealth Dept. of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989) (invalidating collection obligations on out-of-state mail order house); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo.App. 1988) (citing *Bellas Hess* for proposition that "[m]erely communicating with customers in a state by mail or common carrier as part of a general interstate business does not create a sufficient nexus"); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986) (invalidating collection obligations on out-of-state mail order house); *Aldens, Inc. v. Miller*, 466 F. Supp. 379, 383 (S.D.Iowa 1979) (state could not impose use tax collection obligations on out-of-state mail order insurance company) (dicta), *aff'd*, 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971) (invalidating imposition of use tax collection and payment obligations on out-of-state mail order book seller).

[7] The court reaffirmed the trial court's conclusion that the facts of *Bellas Hess* are "indistinguishable from the facts of this case." Pet. App. A8-A9.

[8] A copy of the *Quill* slip opinion has been lodged with the Clerk of this Court. While petitioner's position is also supported by a Tennessee trial court, *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct. Tenn. March 11, 1991) and *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct. Tenn. March 8, 1991), the ruling in the *Blommingdale's* case is on appeal to the Tennessee Supreme Court and the *Folio* case has been placed on inactive status pending that appeal. Just last year, in *Pearle Health Services, Inc. v. Taylor*, 799

cision, which fails to give required deference to this Court's plain commands, does not suggest that certiorari should be granted.

In *Quill*, the court reviewed North Dakota's effort to impose use tax collection obligations on "every person who *engages in the regular solicitation* of sales of tangible personal property in this state by the distribution of catalogues, periodicals, advertising flyers or other advertising, by means of print, radio or television media, or *by mail* . . . ." (Emphasis supplied.)[9] Regulations pursuant to the statute defined "regular or systematic solicitation" as "three or more separate transmittances of any advertisement or advertisements" during the year. N.D. Admin Code § 81-04.1-01-03.1(3) (1984). The statute, in short, was designed to reach any mail order seller who made three or more solicitations by mail to residents of the state within a twelve-month period.

The district court invalidated the statute, noting that the State's arguments were "merely restatements" of the dissent in *National Bellas Hess*, which is "not the law of the United States nor of the State of North Dakota." *North Dakota v. Quill Corp.*, N. Dakota Tax Reports (CCH) ¶ 200-376 (May 15, 1990).

S.W.2d 655 (Tenn. 1990), the Tennessee Supreme Court recognized the continued viability of *Bellas Hess*. *Id.* at 658.

[9] Section 57-40.2-01(7), N.D. Cent. Code (Supp. 1989). The definition in its entirety is:

> "Retailer maintaining a place of business in this state", or any like term, shall mean any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state . . . . It also includes every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.

On review, the North Dakota Supreme Court acknowledged that in reaching this far, the statute was inconsistent with *National Bellas Hess*, which "drew a 'bright line' distinction between mail order sellers whose only connection with its customers in the taxing state was by common carrier or the United States mail and those with more significant connections with the state." *North Dakota v. Quill Corp.*, No. 900257, slip op. at 6 (N.D. Sup. Ct. May 7, 1991). Nonetheless, the court concluded "that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." *Quill*, slip op. at 12. In support of this remarkable conclusion, the North Dakota Supreme Court cited no decision of this Court questioning the continued validity of *National Bellas Hess*, nor even any dissenting opinion by any Justice that had done so since 1967. Rather, the state court quoted liberally from then-Justice Fortas' dissent in *National Bellas Hess* itself and concluded that the dissent accurately "forecast" the diminished value of that precedent. *Quill*, slip op. at 7.

The North Dakota Supreme Court has plainly failed to give appropriate deference to this Court's decisions. When a question of federal right is submitted to a state court, it is the duty of that court "to administer the law prescribed by the Constitution . . . as construed by this Court." *South Carolina v. Gailey*, 289 U.S. 412, 420 (1933).[10] This is so even in areas where, unlike the present situation, some doubt exists as to whether this Court would adopt the approach as an initial matter.

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[10] *See also, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958). ("The federal judiciary is supreme in the exposition of the law of the Constitution."); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 n. (1964) (a Supreme Court decision interpreting the Federal Constitution, "under the Supremacy Clause, is binding upon state courts as well as upon federal courts"); *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 221 (1931) (determination of a federal question by the Supreme Court "is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding").

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijar v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). "A different principle would lead to the most mischevious consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions."[11] This Court would be required to routinely exercise its certiorari jurisdiction to correct mere errors in the application of established precedent by the state courts.

Moreover, this Court has already considered, and rejected, the very arguments now advanced by the *Quill* court and by petitioner. In *Bellas Hess* itself the Court extensively discussed use tax nexus and rejected the dissent's contention that "systematic, continuous solicitation and exploitation" of a state's market should satisfy the constitutional requirement of nexus. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). Neither petitioner nor the *Quill* court has provided any grounds that would justify the Court's reconsideration of this same "economic presence" test, a concept directly and unequivocally repudiated in *Bellas Hess*.[12]

Aside from its reliance on the rejected "economic presence" argument and Justice Fortas' dissent in *National Bellas Hess*, the sole basis on which the North Dakota Supreme Court concluded that *National Bellas Hess* had

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[11] *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

[12] The point had been forcefully argued in *Bellas Hess*. Appellee's Brief at 7-9, 18, *Bellas Hess* (O.T. 1966, No. 241) (state argued that sufficient nexus exists when seller, "in a systematic and continuous aggressive manner exploited the Illinois consumer market" by soliciting sales through catalog distribution).

been eroded was that the state court could not "ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent." *Quill*, slip op. at 9. The court first pointed to the increased volume of mail order business, finding that to be "the greatest change in mail order since 1967 . . . ." *Id.*, slip op. at 10. It also pointed to the new methods for ordering goods, including "toll-free telephone lines, fax orders, and direct computer ordering," and the new methods for delivery of such goods, including "advances in the parcel delivery industry . . . including overnight delivery . . . ." *Id.*, slip op. at 11. Neither the *Quill* opinion nor petitioner explains how any of this could have any relevance to the rationale of this Court's *National Bellas Hess* decision.

The actual volume of sales cannot alter the constitutional principles limiting a state's power to tax beyond its borders. In fact, the Court in *Bellas Hess* implicitly recognized that the constitutional rule announced in that case cannot fluctuate with quantitative factors such as sales volume or the size of the mail order industry. Although the Court was clearly aware that the sizable number of mail order sales at issue in 1967 [13] would increase in coming years,[14] the size of the industry itself did not affect the Court's constitutional analysis.

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[13] Bellas Hess' sales to Illinois residents in the fifteen month period at issue in that case totalled $2,174,744. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). Folio's sales to Connecticut residents in the *four year* period covered by the assessment were nearly identical: $2,174,036.30. *See* Pet. App. A22. Thus, Folio's annual sales were less than a third of National Bellas Hess' annual sales. Petitioner's emphasis on an "explosion" in the mail order industry overlooks the very substantial character of the mail order business directly at issue in *Bellas Hess*.

[14] It is evident from the dissent in *Bellas Hess* that the Court was cognizant of the substantial number of mail order sales and expected growth of the industry: "[T]his haven of immunity [for mail order sales] may well increase in size and importance." *Bellas Hess*, 386 U.S. at 764 (Fortas, J., dissenting).

Despite the assertions of the *Quill* opinion and petitioner (*Quill*, slip op. at 22, 26; Pet. at 10-11), there is also nothing "new" in the mail order industry that affects this Court's constitutional analysis of the burden imposed upon mail order houses for the collection of out-of-state use taxes. The burdensome compliance obligations that led the *Bellas Hess* Court to declare Illinois' assertion of tax jurisdiction unconstitutional have increased, rather than decreased, with the passage of time. The *Bellas Hess* Court noted that in 1965, "over 2,300 localities" imposed local sales tax (386 U.S. at 759 n.12); today, approximately 6,500 jurisdictions have the statutory authority to impose sales and use taxes. *See*, Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 539 (1991). Today as in 1967, "[h]ardly two States provide identical exemptions," Appellant's Brief at 26-27, *Bellas Hess* (O.T. 1966, No. 241), but now, because of the growth in taxing jurisdictions, the exemption burden has grown almost threefold. Whereas 42 states had sales and use taxes in 1967, today 45 States and the District of Columbia have such taxes, adding even more burdensome recordkeeping requirements than drove the Supreme Court to invalidate the Illinois tax scheme in *Bellas Hess*.[15]

While computers might make it easier for mail order firms to calculate the tax due to each jurisdiction,[16] pro-

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[15] Aside from the enormous recordkeeping and record production requirements, the growth in the number of taxing jurisdictions raises the specter of nearly perpetual audits. *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 31-32 (1987) (colloquy between Rep. Judd Gregg and Deputy Assistant Secretary of the Treasury O. Donaldson Chapoton). *Cf.* Appellant's Brief at 27-28, *Bellas Hess* (O.T. 1966, No. 241).

[16] However, Congressional testimony has strongly suggested that even this supposed benefit may be illusory. *See, e.g., Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on*

found administrative burdens still remain, and collection obligations are still much more burdensome on mail order companies than on local retailers. Many customers still pay for mail order or merchandise by check and money order, and often make mistakes in calculating tax.[17] The mail order house must either pay the tax itself or bill the customer for the additional tax.[18] Computerization at the mail order house does little to solve these problems. "On average, mail-order companies bear six or seven times the collection costs of in-state retailers who can collect sales tax at the cash register." Note, 79 Geo. L.J. at 541. Far from receding with the passage of time, the compliance burdens on out-of-state mail order companies have actually grown.

In addition to relying on supposed changes in the mail order industry, the *Quill* opinion and the petitioner here, Pet. at 12-13, claim that this Court's decisions have undermined *National Bellas Hess*. The *Quill* opinion urged that "the most striking shift in the Court's position on taxation of interstate commerce occurred in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)," in which this Court announced a four-part test for invali-

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S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance, 100th Cong., 1st Sess. 52 (1987) ["*Hearing on S. 639 and S. 1099*"] (testimony of Alan Glazer). Witnesses have also noted that computer tax programs are not equipped to recognize tax exemptions for products, which vary from jurisdiction to jurisdiction, nor can such programs judge whether products fit within a given exemption. *See, e.g., Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 178 (1987) (testimony of Heath Kline); *Hearing on S. 639 and S. 1099* at 53 (testimony of Robert Levering).

[17] Even the computer tax programming industry itself admits that this burden cannot be lifted by computer technology. *Hearing on S. 639 and S. 1099* at 206 (letter from Ray Westphal, President, Vertex Systems).

[18] Conn. Gen. Stat. § 12-411(3).

dating state taxation under the Commerce Clause. *Quill*, slip op. at 12.[19] However, *Complete Auto Transit* continued to require a showing of "substantial nexus," and this Court on at least two occasions since the decision in *Complete Auto Transit* has reaffirmed *National Bellas Hess*, and made clear that the decision was entirely consistent with the *Complete Auto Transit* decision.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the Court noted that *National Bellas Hess* is the touchstone of the first prong of *Complete Auto Transit*: "Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967)." *Commonwealth Edison*, 453 U.S. at 626. (emphasis in original). And as recently as 1988, this Court unanimously reaffirmed its *Bellas Hess* holding in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988):

> In *National Bellas Hess*, we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier.

See also National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).

Neither the *Quill* opinion nor petitioner cites a single decision of this Court that questions the continued validity of *Bellas Hess*.[20] Instead they rely on personal juris-

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[19] Under that test, a state tax will be sustained so long as "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

[20] This Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987)—a decision relied on

diction cases (*see Quill*, slip op. at 18-21; Pet. at 8-9) that exclusively address the due process concerns that limit a state's exercise of *personal* jurisdiction over a nonresident.

Again the *Quill* opinion and petitioner fail to note that the Court in *Bellas Hess* refused to adopt a standard fashioned from these personal jurisdiction nexus cases. In *Bellas Hess*, the state directly urged the Court to adopt the economic presence test that had already been applied in personal jurisdiction cases for at least ten years. *See* Appellee's Brief at 32-34, *Bellas Hess* (O.T. 1966, No. 241). This Court declined to adopt the personal jurisdiction test in the tax area, and held in *Bellas Hess* that even continuous and systematic solicitation by mail cannot create tax nexus when the taxpayer is not physically present in the state.

In short, while the decision of the North Dakota Supreme Court may provide an adequate ground for summary reversal in that case, as authorized by Rule 16.1 of the Rules of this Court,[21] it provides no ground for granting certiorari in this case.

Clearly, petitioner addresses his argument to the wrong forum when he expresses continued dissatisfaction with the impact of *National Bellas Hess* upon his ability to collect use taxes on goods purchased by Connecticut consumers. Congress has authority to fashion an equi-

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in the *Quill* opinion (slip op. at 18) and by petitioner (Pet. at 8-9) —did not do so directly or by implication. It upheld taxing jurisdiction because the taxpayer's employee resided in the state and performed substantial activities on the taxpayer's behalf there. Thus, the taxpayer maintained a significant physical presence in the state. In *Standard Pressed Steel v. Washington Department of Revenue*, 419 U.S. 560 (1975), also relied on in *Quill* (slip op. at 16-18), this Court similarly upheld imposition of the state's business and occupation tax on a company because its employee had "a full-time job within the State . . . ." *Id.* at 562.

[21] *See* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 5.19 at 296-97 (6th ed. 1986).

table and forward-looking system for the collection of state use taxes by out-of-state sellers that will avoid upsetting the settled expectations of the parties and the burdens and inequities that individual state and local collection efforts would impose. Congress is well aware of the claims of the state taxing authorities: in recent years numerous bills have been introduced to achieve legislatively the goal that petitioner seeks here.[22] While there is debate about the form that such legislation should take, some of these proposals would seek to address the substantial compliance burdens for out-of-state mail order firms and their customers by establishing a uniform national rate of tax, an adequate collection allowance, a uniform definition of exempt items, a uniform tax treatment of shipping and handling charges, and a single filing and audit procedure.[23]

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[22] *See, e.g.*, S. 2368, 100th Cong., 2d Sess. (1988); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 1st Sess. (1987). Hearings have been conducted on many of these pending bills, as well as former legislative proposals. *See, e.g., State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987); *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 100th Cong., 1st Sess. (1987); *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

[23] *See, e.g.*, Committee on State Taxation of the Counsel of State Chambers of Commerce, *COST Endorses Compromise on Bellas Hess Legislation*, State Tax Report No. 244 at 1 (Dec. 15, 1989).

II. IN DECLINING TO ATTRIBUTE THE ACTIONS OF RELATED CORPORATIONS TO FOLIO, THE CONNECTICUT SUPREME COURT'S DECISION WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Although petitioner primarily contends that this Court should "revisit" its decision in *Bellas Hess*, petitioner also intimates that an alternate ground exists for review in this case. *See* Pet. at 10-11. Petitioner suggests that Folio has sufficient nexus with Connecticut, even under the *Bellas Hess* rule of physical presence, because Folio is part of a larger enterprise of affiliated corporations and should be deemed to share the nexus that Saks-Stamford has with Connecticut. *See* Pet. at 7. The Connecticut Supreme Court treated this issue purely as a question of state corporate law.[24] As a result, its decision on this point rests on adequate and independent state grounds and is not subject to further review by this Court. *See generally* R. Stern, *supra* note 21, § 3.25 at 168.

The state court's opinion relied solely on principles of Connecticut corporate law in rejecting an "enterprise" theory and refusing to impute Saks-Stamford's activities to Folio. The Connecticut Supreme Court characterized the "enterprise" issue as one of state law by first referring to the traditional corporate theories of "piercing the corporate veil" and "alter ego," and then summarizing the Commissioner's position as one seeking to "disregard" the separate corporate existence of Folio and Saks-Stamford. Pet. App. A10, A11. Equally clear is the court's extensive consideration and application of these corporate law principles in reaching its result:

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[24] In addition, the Connecticut Supreme Court affirmed the Superior Court's factual finding that "Saks-Stamford is not Folio's retail store, agent, instrumentality, or alter ego." Pet. App. A24.

> It is undisputed that in Connecticut a court will disregard the corporate structure and pierce the corporate veil 'only under exceptional circumstances,' . . . . Nevertheless, the commissioner seeks to have this court abandon our traditional notions of corporate law and ignore Folio's separate corporate existence under an enterprise theory.

Pet. App. A11-A12. In refusing to "abandon [Connecticut's] traditional notions of corporate law," the court noted that:

> Clearly, there is no statute within the Connecticut sales and use tax chapter . . . that allows the commissioner to treat separate corporations as part of one enterprise for the purpose of imposing sales and use tax liability, and the commissioner does not make such a claim. Absent such statutory authority, the line of cases pursuant to the 'unitary business principle' are inapplicable.

Pet. App. A12-A13. Relying on the "fundamental principle of corporate law that 'the parent corporation and its subsidiary are treated as separate and distinct legal persons,' " the court concluded that "we would not be justified in disregarding Folio's separate identity for tax purposes." Pet. App. A13, A15.

The decision shows that the Connecticut Supreme Court relied exclusively on state corporate law principles to find that the in-state presence of Saks-Stamford was irrelevant to Folio's tax liability in Connecticut. Inasmuch as the Connecticut Supreme Court disposed of the enterprise theory solely on state law grounds, petitioner cannot now resurrect this theory as an alternate ground for review. *See, e.g., Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1871); *see also Michigan v. Long*, 463 U.S. 1032, 1037-39 (1983); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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